of the defendants will entitle such or all of the defendants to an acquittal at your hands.

.....

Judge of the District Court.

Given.
Refused.
Modified. [139]

Instruction No. 101

It becomes important for me to define a conspiracy as that word must be defined under the law just quoted to you. A conspiracy, in criminal law, as applied to the charge in this case, is an agreement or understanding between two or more persons whereby they become definitely committed to defraud the United States by the means and in the manner embodied in the agreement followed by an overt act committed by one or more of them in furtherance of the unlawful object of the conspiracy.

.....

Judge of the District Court.

Given.
Refused.
Modified. [140]

Instruction No. 102

I further instruct you that the only conspiracy with which we are concerned in this case is the conspiracy outlined and limited in the first count of the indictment. This count charges but one combination or conspiracy, however diverse its objects, and no defendant can be convicted thereunder unless it is

shown beyond a reasonable doubt that he was a member of or a party to the particular conspiracy charged. The scope of the conspiracy must be gathered from the testimony and not from the averments of the first count, but the averments of the indictment limit the scope and it cannot be extended.

.....

Judge of the District Court.

Given.
Refused.
Modified. [141]

Instruction No. 103

Before you can convict any defendant on the conspiracy charge in this case you must be satisfied beyond a considerable doubt that such defendant had knowledge of the agreement to defraud the United States by the means and in the particular manner alleged in the first count and you must further be satisfied beyond a reasonable doubt that such defendant intentionally participated in the transaction with a view to the furtherance of the common design and unlawful purpose.

Mere knowledge or approval of a conspiracy, if one existed, without intentional participation does not make one a party to a conspiracy.

.....

Judge of the District Court.

Given.
Refused.
Modified. [142]

Instruction No. 104

The assence of a conspiracy charge is the unlawful agreement and combinations of the defendants. No amount of reprehensible conduct on the part of the defendants is sufficient to warrant a conviction of conspiracy unless the existence of an unlawful agreement or combination among the defendants to commit the unlawful acts or to accomplish the unlawful purpose charged in the first count is proven beyond a reasonable doubt and to a moral certainty.

.....

Judge of the District Court.

Given.
Refused.
Modified. [143]

Instruction No. 105

The mere fact that a defendant may have engaged in the performance of an act charged in the first Count would not authorize his conviction on that fact alone. Before you can find such defendant guilty you must be satisfied beyond a reasonable doubt that he was a party to the unlawful agreement and participated therein with the intention to promote a common and unlawful design, to-wit, to defraud the United States. If a defendant was not actuated by such intent he cannot be guilty of conspiracy.

.....

Judge of the District Court.

Given.
Refused.
Modified. [144]

Instruction No. 106

I charge you that there are certain types of crime which are complete when the person intentionally does the acts denounced by law. There is another class of crime which requires not only the deliberate act but a further element, to-wit: the commission of the acts with a specific intent. The first intent, that is, general intent, is merely to do the act: the second class is to do the act with a specific intent that this act may bring about a certain result.

The specific intent involved in each count of this indictment is an intent to defraud the United States. This intent is a question of fact which must be proven by the prosecution beyond a reasonable doubt. After considering all the evidence, including the presumption of honest and lawful intent with which every defendant is clothed, should you entertain a reasonable doubt as to the intent of any defendant to defraud the United States you must acquit such defendant or defendants for whom you entertain such doubt.

.....

Judge of the District Court.

Given.
Refused.
Modified. [145]

Instruction No. 107

I further instruct you in connection with counts two to seven, inclusive, that no person can be held criminally responsible for the criminal acts of an-

other unless the evidence established beyond a reasonable doubt not only that he knew of such acts but that he actually participated or aided in the performance of the same with the specific intent to defraud and deceive in the manner alleged in the indictment.

.....

Judge of the District Court.

Given.
Refused.
Modified. [146]

Instruction No. 109

I instruct you in connection with counts two to seven inclusive that no officer of a corporation can be held criminally responsible for the criminal acts of ~~any other officer~~ or employee of the corporation unless the evidence establishes beyond a reasonable doubt that such officer not only knew of such criminal acts but that he personally participated in their commission or directed the same with the specific intent to defraud and deceive in the manner alleged in the indictment.

.....

Judge of the District Court.

Given.
Refused.
Modified. [147]

Instruction No. 110

You are instructed that in order to render a principal criminally liable for acts of his agent or employee

the principal must have authorized, commanded or connived at the commission of the offense.

.....

Judge of the District Court.

Given.
Refused.
Modified.

2 C.J. Sec. 540, p. 855. United States v. Beaty, 24 F. Cas. No. 14855. United States v. Buck, 24 F. Cas. No. 14595. [148]

Instruction No. 111

You are instructed that before one can be convicted of a crime by reason of acts of his agent or employee, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent or employee within the scope of his authority has no application to criminal law. If a principal is liable at all criminally for the acts of another, such liability must be founded upon authorized acts. Authority to do a criminal act will not be presumed.

.....

Judge of the District Court.

Given.
Refused.
Modified.

22 C.J.S. Sec. 84a, p. 150. People v. Doble, 265 p. 184, 203 Cal. 510. [149]

Instruction No. 112

You are instructed that in a criminal case, and this is a criminal case, a principal is not criminally

liable merely because his agent or employee may have engaged in conduct which the law denounces.

In order to render a person criminally liable it is essential that he have the requisite criminal intent at the time the supposed criminal act was committed. In other words, specified intent cannot be imputed to a person through an agent or employee without the principal's direct participation in the criminal act.

.....

Judge of the District Court.

Given.

Refused.

Modified.

22 C.J.S. Sec. 84(a) p. 149. Paschen v. U.S., C.C.A. Ill, 70 Fed [150]

Instruction No 113

If you believe from the evidence that the defendants in using or causing to be made and used the invoices described in counts two to seven, inclusive, acted in good faith or without fraudulent intent then you shall find all the defendants not guilty of all of these offenses.

.....

Judge of the District Court.

Given.

Refused.

Modified. [151]

Instruction No. 114

If you believe from the evidence that the invoices used or caused to be made and used by the defendants were false or incorrect merely because or some inadvertence, mistake or negligence on the part of one or more of the defendants or some other person, then you shall find the defendants not guilty of the substantive offenses.

.....

Judge of the District Court.

Given.

Refused.

Modified. [152]

Instruction No. 116

I instruct you that when a seller, who is neither the grower, producer or manufacturer of an article, sells such article subject to inspection and the right of rejection by the buyer at the time of delivery to and receipt by the buyer, there is no express or implied warranty from the seller as to the quality or condition of the article sold.

If you find from the evidence in this case that the eggs sold by Nye & Nissen to the departments and agencies herein involved were sold to such buyers subject to inspection and the right of rejection by such buyers at the time of delivery Nye & Nissen, the seller, by such sale does not warrant either the quality or condition of such eggs, and the buyers to whom title passes at the time of such delivery be-

come their own judge as to their quality and condition and assume all risk and responsibility therefor.

.....

Judge of the District Court.

Given.
Refused.
Modified. [153]

Instruction No. 117

In connection with United States Exhibits 179, 180, 181, 182, and 183, which are letters from the Hammond Shipping Company to Nye & Nissen pertaining to a complaint about a shipment of eggs and the reply letter thereto of Nye & Nissen, I instruct you that this evidence is collateral to and not relevant to the issues being tried before you and you are therefore directed to entirely disregard these letters for all purposes in your deliberations.

.....

Judge of the District Court.

Given.
Refused.
Modified.

Estate of Gird, 157 Cal. 534; People v. Dye, 75 Cal. 108. [154]

Instruction No. 118

I charge you that, if you find that weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party offering such evi-

dence, the evidence offered should be viewed with distrust.

.....

Judge of the District Court.

Given.
Refused.
Modified. [155]

Instruction No. 119

You are instructed that from time to time counsel for the defendants interposed objections to evidence. I charge you that the counsel for said defendants not only had the right, but had the duty to make any and all objections which he deemed advisable or appropriate, and no inference or presumption can or should be indulged in by you against any defendant by reason of the interposition of such objections by the counsel for such defendants.

.....

Judge of the District Court.

Given.
Refused.
Modified. [156]

Defendant's Instruction No. 120

I instruct you that a false invoice means a statement or a claim which is not true. I think that the law did not intend to make a mere mistake, made through error or inadvertence, to be brought within the definition of a false claim as used in the law, if it was believed by the person to be true. An error, for instance, might occur in the amount of figures,

or in the name, or there might even be an inadvertent statement of a claim which might be technically in fact false. And if it were not known to the person, and if he did not mean to make a false claim, a mistake thus honestly made would not expose him to punishment under the statute. Neither is a mere lack of business capacity or prudence what the statute would punish for. But if the entry was an untrue one, and was known to the person to be untrue and false, and was by him made while so knowing its false and untrue nature, then a jury should find that such a person, if on trial, did, within the meaning of the statute, make a false claim. A fictitious claim against the government is one preferred against it for supplies said to have been furnished to the government, or for services said to have been rendered to it, no part of which said supplies or services were in fact rendered or supplied. A fraudulent claim against the government is a false or fictitious claim, gotten up or contrived by some person or persons with the design or purpose to deceive or defraud the government or its departments, or to present it for approval or payment.

Bridgeman v. United States, 140 Fed. 577, 594 (C.C.A. 9, 1905).

.....

Judge of the District Court.

Given.

Refused.

Modified. [157]

Defendant's Instruction No. 121

"This is a prosecution for a criminal offense. To be punishable, the act charged must have possessed at the time when its commission was completed, every element necessary to its criminality under the Statute. A completed act which is not an offense at the time of its commission cannot become such by any subsequent act of the party charged or of another with which it has no connection; and this is true whether the first act was done for a good or bad purpose."

Justice Van Devanter, in U. S. v. Dietrich, 126 F., 676, p. 685; Approved in U. S. v. Terry; approved in Terry v. U. S. 131 F. (2d) 40, p. 45.

.....

Judge of the District Court.

Given.

Refused.

Modified.

[Endorsed]: Filed May 20, 1946. [158]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING AND DOCKETING RECORD ON APPEAL

The trial of the above-entitled cause having consumed 43 trial days and the record on appeal being

voluminous and further time being required to file and docket the record on appeal;

Now, Therefore, It Is Ordered that the time for the filing and docketing of the record on appeal in the above-entitled cause be and the same is hereby extended to and including the 21st day of June, 1946.

Dated: May 22, 1946.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed May 22, 1946. [159]

District Court of the United States,
Northern District of California.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 159 pages, numbered from 1 to 159, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America, Plaintiff, vs. Nye and Nissen, a corporation, and Abraham Moncharsh, Defendants, No. 29518 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of $22.00 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 31st day of May, A. D. 1946.

(Seal) C. W. CALBREATH,
Clerk,

/s/ M. E. VAN BUREN,
Deputy Clerk. [160]

In the Southern Division of the United States District Court. In and For the Northern District of California.

Before: Hon. Michael J. Roche, Judge.

Criminal No. 29,518-R

UNITED STATES OF AMERICA,

vs.

NYE & NISSEN, a corporation; ABRAHAM MONCHARSH, HENRY EUGENE BERMAN, RUBY JUTLAND GODDARD, and EDWARD LEROY MENGES,

Defendants.

REPORTER'S TRANSCRIPT

Tuesday, January 15, 1946

Counsel Appearing for the United States: D. Wendell Reid, Esq., Attorney, Department of Justice; John S. Pratt, Esq., Special Assistant to the Attorney General; Alden F. Houck, Esq., Special Attorney; George W. Rippeli, Esq., Special Attorney for the Defendants: Harold C. Faulkner, Esq.; Alfonso J. Zirpoli, Esq.; William M. Malone, Esq.; Raymond L. Sullivan, Esq. [1*]

(A jury was empaneled and sworn to try the cause, after which an adjournment was taken until 2:30 p.m.)

* Page numbering appearing at top of page of original Reporter's Transcript

Afternoon Session, January 15, 1946, 2:30 o'clock p. m.

The Court: Call the roll of jurors.

(Roll called.)

The Clerk: All present, your Honor.

Mr. Faulkner: At this time, your Honor, we would ask for an order excluding all witnesses in this case except any exceptions that Mr. Pratt wishes to designate.

Mr. Pratt: We would like to except the two agents of the FBI, Mr. Magee and Mr. Brown. Also Mr. Johnson.

Mr. Faulkner: We would like to except Mr. Smith, who is the Vice-President of Nye & Nissen, to be here on behalf of the corporate defendants from time to time.

The Court: With those exceptions, all witnesses may retire until called. You may proceed.

OPENING STATEMENT ON BEHALF OF THE UNITED STATES

Mr. Pratt: If the Court please and ladies and gentlemen of the Jury, it is my duty at this time on behalf of the Government to make what is known as an opening statement. The purpose of this statement is to enlighten you as much as possible as to the exact nature of the charges which are made against the defendants in this case, and also to tell you to some extent, [2] as much as is possible, what the evidence of the Government will be to establish these charges. When you were examined

as jurors by his Honor at the outset, he told you something of the nature of these charges, but perhaps it is necessary or important that I enlarge somewhat upon those statements that the Court made.

In the first place, as he told you, of course, this is a criminal case and the charges are represented by an indictment returned by the Grand Jury of this District. And I repeat what the Court said to you—or perhaps it was Mr. Faulkner—that the indictment is not any evidence against these defendants. The indictment is the mere vehicle whereby a criminal charge is made in the United States Court. Furthermore, besides being a criminal case, this is known, so far as the Government is concerned, as a war fraud case because it involves contracts between the United States and the defendants, particularly the defendant corporation, contracts which had to do with the supplying of merchandise, of food products, in connection with the prosecution of the war.

The defendants in this case, as has already been pointed out to you, are first a corporation known as Nye & Nissen, Incorporated. I think it will sometimes be referred to as Nye and Nissen Company or just Nye & Nissen.

The individual defendants in the case who were pointed out to you, who are sitting in front of the rail, are Mr. Abraham [3] Moncharsh, who is and has been for a long time, I think, the President of this corporation, Nye & Nissen; then there is Mr. Berman, Mr. Goddard, and Mr. Menges, all of

whom, the evidence will show, were employees of the company and cooperated with Mr. Monicharsh in connection with the offenses which are charged and which are here now on trial.

There is another man mentioned in the first count of the indictment, a man by the name of James Roosevelt Nix. Nix is named as a co-conspirator. I think the Court mentioned that. But not a defendant. That is to say, he is not on trial, and he is not charged in this indictment with any offense. He is charged, however, as being a co-conspirator with the others in the first count of this indictment.

First I want to tell you just what the business of this concern was during the period under inquiry. And, by the way, the indictment charges that the conspiracy existed over a period of some years commencing about the first of January, 1938, and extending up to June of 1945. That is just this last year. Now, the business of this company is described in the indictment itself, and I will read it to you:

"Nye & Nissen was a corporation organized and existing under the laws of the State of California with its principal place of business in the City and County of San Francisco, State of California, and with plants in the said City and County of San Francisco and in the city of [4] Petaluma, County of Sonoma, State of California. At all times therein mentioned Nye & Nissen, a corporation, was engaged in the business of purchasing eggs, butter and cheese from producers; inspecting, grading,

weighing and packing eggs, butter and cheese, and selling eggs, butter and cheese to the United States of America, War Shipping Administration, the United States War Department, and the United States Navy Department."

Now, eggs, butter and cheese have been mentioned in connection with the commodities or products which were dealt with by Nye & Nissen and sold to the Government of the United States, and the fraud charged in all the counts relates to the sale of eggs, butter and cheese, but more largely and much more extensively, so far as the evidence is concerned which will be brought to you from the witness stand, connected with the sale of eggs. Eggs in very large quantities were sold by these defendants and in most instances, or in many instances, these eggs were sold to be delivered at piers in cities of California to be put on shipboard of ships of the United States which were going thence into the war zones, these boats being either cargo vessels, carrying supplies, munitions, and so forth, into the war area, or they were transport vessels carrying soldiers for the same purpose and to the same destinations.

In order that the evidence may be understood, and before I [5] come directly to the specific description of the offenses charged in the indictment, I think it may be important to point out to you at this point what the evidence will show in connection with the manner in which these boats, these ships, were operated for and on behalf of the Government. The plan under which they were operated

was this: as you know, there are many shipping companies here and in Los Angeles. In fact, Mr. Faulkner in interrogating you mentioned the names of quite a number of these shipping companies. I think he mentioned the Matson Steamship Lines and the American President Steamship Lines and the Alaska Transportation Company and the American Hawaiian Steamship Lines. Now, in order to operate these boats the Government was in the custom of entering into what were known as general agency contracts with the particular shipping lines, and these contracts, certified copies of them, will be in evidence before you.

Taking an instance to illustrate the plan, a contract will be made, for example, with the Matson Steamship Company by the United States in which it is provided that the general agent is appointed for the purpose of conducting the business of the Government so far as the operation of certain ships is concerned, such ships as may thereafter be assigned to that particular shipping company. Under the terms of this contract the general agent undertakes in the name of and on behalf of the United States not only to manage the transportation of [6] supplies and perhaps soldiers, but it undertakes to equip, victual, supply and maintain the boat for the account of the United States. These contracts further provide that all of this shall be done at the expense of the United States. In some instances it will appear that the Government made a deposit of perhaps a very large sum, a deposit of money, with this general agent, and thereafter the expenses

of operating, the cost of supplies, were paid by the shipping company out of these funds which were deposited with it, and from time to time the funds would be added to or restored if it happened to be depleted or near depletion.

In other instances, according to the evidence, after the shipping company has paid these expenses or costs of equipment, the purchase of supplies, has paid for it out of its own funds, it secures reimbursement by the United States. The effect of all of this is, of course, this: that whatever was done by the general agent in operating these boats was done on behalf of the United States and the United States was paying all of the bills.

Now, in victualling and providing the boats sailing from this port with foodstuffs for the feeding of the crew and passengers the shipping company would issue what are known as purchase orders directed to the supplier of food products, and this brings us to the fact that these shipping companies, by means of such purchase orders, ordered large quantities of [7] eggs, butter and cheese from Nye & Nissen. The purchase in every instance was in the name of the United States, War Shipping Administration, or in the name of the War Department directed to the Nye & Nissen Company, and by the terms of these several purchase orders it was required that when the goods had been furnished they should be invoiced to the United States of America, War Shipping Administration, or perhaps to the Army if the supplies were furnished for direct army usage.

It was further provided that all food products which were thus supplied to these general agents for the use of these ships, must be governed by government inspection requirements, and that meant that so far as butter, eggs and cheese were concerned these products had to comply with inspection requirements of either the Department of Agriculture inspectors or of the Veterinary Corps of the Army or of the Quartermaster Corps. Not only was inspection required but the products were required to be up to certain standards which were established by either the Department of Agriculture or by the Army or by other appropriate government orders.

That bring me to some very brief discussion of the manner in which eggs are examined and how they are graded, how they are inspected. I imagine the ladies of this Jury know a lot more about eggs than I do, and I suppose I sain say the same, that they know more about it than the gentlemen on the Jury. [8] But eggs, in the first place, are examined by means of candling. The process of candling eggs—I never saw it done, and I do not know whether you ladies and gentlemen have or not—involves the use of a bright light, which is applied ordinarily in a booth which is dark, and the inspector takes eggs in each hand out of the container that is nearby—I think the practice is to take two eggs in each hand and quickly put them in front of this light to discover the quality of the egg.

Now, eggs, so far as quality is concerned, have

various classes. Double A is the best and A is the next best. Below that there is B and C and what not. So far as the Government requirements were concerned in the use of eggs and in the purchase of eggs only Grades AA and A were ever acceptable, and AA and A eggs are practically the same as fresh eggs, although I think it will appear that eggs may have been in storage perhaps as long, but perhaps not longer than thirty days and still come up to these classifications of AA and A eggs.

The evidence will appear here before you from the witness stand, which I think will throw considerable light on these grades and the methods of grading and the witness, and they do doubt will make an explanation much better than I can.

Now, besides this matter of grades and quality there was the matter of the size of eggs, and so far as size is concerned,—and [9] in this case the sizes are large, medium and small—I think there is another grade higher than that which they call Jumbo, but they are not involved in this case at all—but so far as Government eggs, eggs for Government use are concerned, only large and medium eggs were ever acceptable. By large eggs, large eggs are established by their quality and by their weight per case. You know, a case of eggs contains 30 dozen, 360 eggs, and under Government regulations a case of eggs must weigh at least 45 pounds to be large eggs. It must weigh at least 40 pounds in order to be medium eggs. Anything below 40 pounds is small. Now, there are other expressions used for small eggs. For instance, there

are pullet eggs or Pee-wee eggs, which are the same thing, and as I am sure the ladies know, the Pee-wees or pullet eggs are little bits of things which would not be at all acceptable to the Government under the regulations of the various departments.

Now, in candling eggs, I have already stated to you that the inspector uses a light, and he uses a light in a booth, and if a quantity, we will say 50 cases of eggs are to be inspected by a Government inspector, he does not examine all of those 50 cases. He makes what is called a spot inspection. Out of 50 cases he would take four or five cases at various places in the lot of cases that are in the warehouse, at, we will say, the Nye & Nissen warehouse. He will select these four or five cases and he would have them brought over by [10] the candling booth, and he would have one of them in the booth, one of these cases, and he would take certain eggs out, examine them before the candling light—he would not take all 360 eggs out, but in one half—these cases are in two sections—in a half-section where there are 15 dozen eggs, he may take 50, 75 or 100 eggs and examine those, and then he would judge the contents of the whole case in the light of what he found in those 50, 75 or 100 eggs.

He then puts an official stamp on the end of that case and he shoves it out of the booth and another case is brought in, and one of the cases presumably that he has selected of this lot of cases—as I say, he indicates in some way the ones he wants to candle, and those are placed together by the booth, and as he examines one and shoves the

eggs out, having put his stamp on it, then another case is put in and he examines that. Now, if he finds from his examination of these four or five cases out of a lot of fifty cases they are acceptable eggs, if they come up to the grade that is specified for the particular order, then he stamps the whole lot of cases. He either stamps them himself with his rubber stamp, date stamp, showing the official designation by the Department of Agriculture inspector, or perhaps he may have one of the employees of the Nye & Nissen Company put the stamps on the other of the 50 cases that are to be approved. And that in brief, and very brief, is the method by which eggs are candled [11] and inspected. I forgot to say in connection with his inspection he is also supposedly either to weigh eggs, a quantity of them, in order to determine the weight of the whole case, or he may, and sometimes does perhaps, rely upon his visual ability to tell the size of eggs from his experience in the past. If he does weigh the eggs he would take all of the eggs out of one side. He would take them out, not loosely, but in flats and fillers. I have to ask some questions about these technical terms. Flats and fillers are cardboard pieces to hold the eggs in place, and if the inspector weighs the eggs, he will take all the eggs out of one side still held in the flats and fillers and weigh them. From that he would deduct the established weight of the flats and fillers themselves, which I think is three and a half pounds, and then when he found the net weight of half the eggs in the case, of course, he

would multiply it by two and find whether the weight of the whole case was sufficient to come within the required weight of medium or large eggs, either 40 pounds or 45 pounds.

I may say at this time that when I say that medium eggs must weigh 40 pounds, that does not mean that they may weigh any less at all. There is no tolerance allowed below the 40 pounds. And the same is true as to the large eggs. They must weigh at least 45 pounds. No tolerance is allowed below that weight.

When it comes to the description of the classes of eggs [12] so far as grade is concerned, so far as quality is concerned, I cannot undertake to explain to you ladies and gentlemen just how these classes are determined except to say, as I did a few minutes ago, that to all intents and purposes they must be fresh eggs, and the candling process will disclose whether they are of that quality.

Now, I think I have described perhaps enough of this process, and now I will get to a more intimate description of what the charge is in this case. The Court has told you that the first count is a conspiracy count. And that is based on a section of the statutes of the United States, which, as the Court told you, is Section 88 of Title 18 of the United States Code. And the language of that conspiracy statute is this:

"If two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to affect the object of the conspiracy, each of the parties

to such conspiracy will be guilty and shall be punished as the Court may direct."

Now, you can see there are two elements to that statute: First, that two or more persons conspire to do an unlawful thing to defraud the United States, and then somebody must do something to carry that conspiracy into effect. That doing something is what is known as an overt act. So that the indictment, besides charging with some particularity the character of this conspiracy to defraud the Government, also must [14] and does allege certain overt acts that were done by one or more of the defendants to carry the conspiracy into effect.

Now, I will come later to a discussion of just what the overt acts are that are alleged in the indictment. As a matter of fact, the Government may prove other acts that are not alleged, so long as they operate in connection with the performance or the execution of the unlawful conspiracy to defraud the Government.

The indictment goes on to charge, as I have said, that these defendants, the corporation and the four individuals, conspired between themselves, among themselves, and also with this man Nix, the co-conspirator, to defraud the United States, first, by grading, weighing, packing, selling and delivering to the United States of America, War Shipping Administration, War Department and Navy Department, inferior products through frauds and deceptions practiced upon the inspectors, graders and representatives of the United States Department of Agriculture, the War Shipping Administration, the

United States War Department and the United States Navy Department, who inspect, weigh, grade and receive butter, eggs and cheese sold and delivered to the United States of America, War Shipping Administration, War Department and Navy Department; second, that they conspired to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the United States Department of Agriculture, the War Department [14] and the Navy Department in the inspection, grading, weighing and purchase of butter, cheese and eggs; and third, they conspired to defraud the United States by circumventing and avoiding the standards, grades, weights and specifications to which said purchases are subject by means of false and fictitious inspection, grading and weighing by said representatives, and by their tricks, schemes, devices and concealments in a manner which follows, so far as description is concerned. I think the reading of those clauses from the indictment undoubtedly gives you ladies and gentlemen a pretty fair idea of what the charge is and, of course, I believe that the evidence from the witness stand will corroborate and establish all these charges as they are quite specifically mentioned in the indictment. Now, the indictment goes on to make a further description of the way in which grading, weighing and packing of inferior products were carried on and the way in which the proper inspection by government inspectors was defeated For example, it is said that the defendants and this co-conspirator Nix would secretly and without

authorization place stamps falsely indicating inspection and grading by inspectors and graders of the Department of Agriculture and the War Department upon cases of eggs which had not been officially inspected or graded, and the evidence will show you something like this, that after a lot of eggs have been inspected—we will say 50 cases have been examined by using certain ones of the cases to [15] examine critically—it has been established, we will say, that the whole lot of 50 cases is quite up to standard grades required for the particular order, thereupon the inspector, instead of stamping each case himself, will have one of the employees of Nye & Nissen Company, or one of the defendants take his stamp and mark those cases, and it will be shown by the evidence, I believe that with this official stamp these defendants will mark perhaps a lot of their loose labels. They will stamp a lot of loose labels stamped with the grade and weight of eggs, and then after the inspector has gone those labels will be put on some other cases, cases of eggs which are far from being up to any standard required by the Government. Then I think it will come from the witness stand that the representative of the defendants, this employee perhaps, having this Government stamp, will surreptitiously stamp other cases besides perhaps stamping these loose labels.

Now again it is said that these defendants and this co-conspirator would prepare sample cases of eggs of a higher grade than the lot to be inspected and graded and submit the sample cases to said

inspectors and graders instead of the cases designated by the inspectors and graders. The evidence will show something of this sort: that the inspector comes to the plant, the warehouse of Nye & Nissen, to inspect a lot of eggs—again I will say 50 cases—and he designates a case here and another there and another here which he will examine. [16] He has them brought in together by the booth and one of them is put into the candling booth. Then when he has finished with that, then a sample case, a case that has been prepared by the defendants with the very highest grade of eggs will be shoved in as if it were one of the cases designated by the inspector, but which has not been designated by him; that case, nicely prepared, will be shoved in to the inspector, and he will inspect that, thinking, of course, that it is one of the cases which he has specifically designated. [17]

Now, another method that they used to deceive the inspectors and to defraud the United States so far as grades of eggs were concerned is to show the same case in to the inspector time after time. The inspector will grade this fine sample case and find it of high quality, will put his stamp on the end, and it is passed out into the warehouse for the placing of another label over that stamped label, and it is shoved in to him again as a new case. They may do that repeatedly so that the inspector has examined the same case over and over again and thus fraudulently has been induced to mark the whole body of the cases that were there for his inspection

as though they were of the same sort as these fancy sample cases that he had in fact examined.

Now, there are other methods which are mentioned in the indictment here, and I do not think I should take your time to call your attention to them. What I have said about these methods of deceiving the inspector are modified in other ways with the same purpose and the same result. That is to say, the purpose of deceiving the inspectors into falsely stamping cases of eggs.

Another thing that I might mention is this, that after a case has been examined, approved and stamped and is out in the warehouse, then the employees of the defendants' employees, employees of Nye & Nissen, or the defendants themselves, will remove the eggs, take the eggs out of that case and put [18] inferior eggs in. Of course, the stamp still remains on the end of the case.

So much for eggs. As I say, there are other methods which were used, as the evidence will show, for defrauding the government and deceiving these inspectors. Let us now come to the matter of butter. They have a butter machine down there at Nye & Nissen into which would be put a great—I could almost call it a cake of butter weighing perhaps 60 pounds, a cube perhaps 12 or 14 inches in dimension, and weighing 60 pounds perhaps. That would be put into a machine which molds the butter into one-pound prints, and these one-pound prints are then wrapped and put into a box, a case by the girls. By manipulating this machine by a wheel, a lever or something of that sort, the machine would cut

slightly less than 16 ounces for one of these prints of butter. And the evidence will show at times they were packaging or printing as many as 20,000 pounds of butter a day in this plant of Nye & Nissen. Now, if they modified the amount, if they decreased the amount of weight that was given a print of butter by as much as a half an ounce, it would make a vast difference, of course, as the evidence will show, in the 20,000 pounds a day of butter being packaged or printed. And it will be shown that there were scales right where the butter came out of this machine in these prints and that it was the custom of inspectors of the government to put them on the scales so as [19] to see whether the butter was coming through a full 16 ounces in weight. But if the inspector was not there, the evidence will show they then manipulated the machine so that it would cut less than 16 ounces in a so-called pound print.

Then it will also be shown that cases of butter which held 60 one-pound prints would be invoiced to the government at 60 pounds, as if there were 60 one-pound prints in the case, instead of only 50. I do not think I need go any further in describing the exact manner in which these defendants operated their business so as to result in fraud upon the government and fraud upon the inspectors. I do not want to take any more time than is necessary to demonstrate the manner in which this case will develop from the witness stand.

I have already said to you that overt acts were necessary to be alleged in order to make a conspir-

acy complaint. Now, the over acts in this case, alleged in the first count of the indictment are five in number. First, it is alleged that "pursuant to and in furtherance of said conspiracy and to effect the objects thereof, at the several times and places hereinafter mentioned within said division and district"—that is the Northern District of California—"said defendants and the co-conspirators did commit the following overt acts."

The first of these charges that, "on or about the 1st day of February, 1942, at San Francisco, at the San Francisco plant of the defendant Nye & Nissen Corporation, the defendants [20] Ruby Jutland Goddard and Edward LeRoy Menges, and the co-conspirator James Roosevelt Nix cut one-pound prints of butter which were being inspected and graded by officials of the War Department of less than one pound and submitted sample prints of butter actually weighing one pound to said officials for inspection and weighing."

You see the allegation there—and the evidence will sustain it—is similar to the method used in deceiving the inspector as to the grade or quantity of eggs.

Then the next of these over acts charges that on June 1, 1940, at San Francisco, the defendants Goddard, Menges, and the co-conspirator Nix, placed stamps purporting to be Department of Agriculture grading stamps on cases of eggs which had not been graded by the Department of Agriculture graders or inspectors. In other words, it is a specific allegation of the practice which I described in

their putting stamps on packages of eggs that had not been in fact inspected at all.

The next of these overt acts is that on February 1, 1942, at San Francisco, the defendants Moncharsh, Goddard, Merges, and the co-conspirator, Nix, switched eggs from cases of eggs which had been inspected and graded by the Department of Agriculture and the War Department officials and inserted eggs of an inferior quality, the specific allegation to support the charge of conspiracy; and the next of the overt acts, the fourth, is that on May 10, 1944, at San Francisco, the [21] defendant sold 45 cases of eggs for delivery to the Steamship Cape Britton at Pier 30 which were of a grade, weight, and price less than represented.

And again, the last of these overt acts, it is alleged that the defendant Berman sprayed the stamped weights off of four cases of California loaf cheese which were to be delivered to the Steamship Cape Cumberland and charged the United States for more weight of cheese than was delivered. And the evidence will show that the correct weight was stamped on these cases; that after Berman had scraped off the the weight and invoiced it at a higher weight, there was no way for the government to tell that they were being cheated except by weighing those particular cases. And, of course, as the evidence will show, in a terrific rush of business in connection with the war, the transportation of huge quantities of supplies, it was impossible to weigh every case of eggs or every case of cheese that went out.

So much for this conspiracy count, ladies and gentlemen, that is the first count of the indictment. Now, the other counts of the indictment—and there are six of them—I can discuss with you very briefly. I certainly do not like to tire you or take more time than is necessary in this preliminary statement. These added counts, counts two to seven of this indictment, are of an entirely different character in this respect, that there is no conspiracy charged in connection [22] with those particular counts, but each count refers to a specific, definite transaction. For example, in the second count it is charged—and I should say first that these six charges are all under a different facet; they are under Section 80 of Title 18 of the United States Code, which makes it an offense to make a false claim against the United States or to make a false claim or invoice within the jurisdiction of a department of the United States Government, which in effect means that it is an offense to make a false claim—these six counts, each of them describes one specific false claim, and as an example of it I will just describe the second count alone. Count two charges that on April 29, 1944, Agwilines, Incorporated, was a corporation which had a contract entered into on the 8th of March, 1942, with the government whereby Agwilines became a general agent for the management and operation of such ships as might be assigned to it. And it was provided in this contract, that I have already described to you, that Agwilines was required to equip, victual, supply, and maintain such vessels as were assigned to it, and that the government would

advance money to pay the bills for this service and for this equipment and these supplies.

Then it goes on to say that on the 23rd of November, 1942, the government under that contract assigned to Agwilines, Incorporated, the vessel Cape Charles. And then it goes on to say that certain supplies were purchased for the equipment, [23] the victualing of the Cape Charles, by means of a purchase order executed by the government to Agwilines, Incorporated, the general agent, the purchase order being directed to Nye & Nissen, a corporation, and it called for 36 cases of eggs of medium double-A process eggs, 1,080 dozen, and also called for 240 pounds of Cheddar cheese. Now, the evidence will show that the defendant company, through its officers and employees, delivered certain eggs and certain cheese to the pier for delivery to this boat, the Cape Charles, and then invoiced the United States that this shipment had in fact been 36 cases of double-A medium process eggs and 240 pounds of Cheddar cheese. As a matter of fact, the evidence will show that instead of being 240 pounds of cheese, there was only 149 pounds of cheese. It was 91 pounds short, so far as the cheese was concerned, and that the 36 cases of eggs, instead of being double-A medium process eggs, were eggs that were below grade and were not acceptable as any grade, were not acceptable to the United States in any circumstances.

This count, therefore, charges that the defendants made this false claim represented by this invoice, and the evidence will show, as I have said,

that the claim was false because the merchandise as delivered was not at all in accordance with what was ordered.

Now, the other counts of this indictment are in substance and effect so similar to this second count that I do [24] not believe it is necessary for me to go into the details of them at this time. Each one of them relates to a delivery of something or other—eggs, butter, and cheese—to a particular boat. It refers to the fact that that particular boat was to be managed by one of these general agents. And then the language of the indictment charges that it was false because it was short of this or that, and the evidence will show exactly what the fact was, namely, that the delivery was defective or deficient in one or perhaps several respects. So that each of those six counts is a separate offense and separate from the conspiracy count.

Now, I have taken a great deal of time, ladies and gentlemen. I want to tell you again that all I have been telling you is what in substance the indictment means and what I expect the evidence to show. Of course, what I have said to you is not evidence at all. It is simply my assurance that from the witness stand will come the evidence to sustain these charges.

The Court: We will take a recess for a few minutes. The Jurors may step out this door, please.

(Recess.)

The Court: Waive the roll call; it is stipulated all the jurors are in the box.

Mr. Faulkner: The defense will withhold its

opening statement until the conclusion of the government's case. [25]

The Court: Very well.

Mr. Pratt: If the Court please, the government now will offer for identification and in evidence certain contracts of which we have certified copies. These are all of a similar nature. They are the so-called general agency contracts between the government and certain shipping companies.

Mr. Faulkner: Are you offering them for identification or in evidence?

Mr. Pratt: I am offering them for identification and in evidence also.

Mr. Faulkner: Are you offering them in evidence at the same time?

Mr. Pratt: I will offer them at the same time. The first of these is marked for identification U. S. Exhibit No. 1.

(The document in question was thereupon marked Government's Exhibit No. 1 for identification.)

Mr. Pratt: That is a certified copy of a contract between the United States and American Export Lines, Incorporated, a general agency contract that has been described in my opening statement, and with it is a document whereby certain vessels are assigned to this corporation for its management, as I also described in my opening statement.

Mr. Faulkner: We object to the introduction of this document, your Honor upon the grounds it is incompetent, irrelevant, [26] and immaterial, hearsay as to the defendants on trial, and as to the

American Export Lines and the Cape Britton, a ship mentioned herein, and neither of them are lines charged in any count of the indictment, nor at this time do they relate to anything pending before the court. In other words, the six overt acts relate to particular companies and particular ships, and we object on the ground that there is no foundation laid for the introduction of any contract between the War Shipping Administration and this line at this time, in addition to the other grounds.

Mr. Pratt: One of the overt acts——

Mr. Faulkner: May I supplement that objection, your Honor, so we can refer to it in the future in this case? These shipping companies are not agencies of the United States Government as defined in Section 80 of Title 18. I won't make a legal argument. Your Honor will recall that when we argued this and discussed it before your Honor previously. In other words, the steamship companies—are they the type of agency that that statute has in mind? Our claim has always been that the agencies involved are agencies similar to the Reconstruction Finance Company and the strict agencies which are governmental in character and not private corporations.

Mr. Pratt: If the Court please, this is a contract between the United States by the War Shipping Administration, which the Court will take judicial notice is an agency of the [27] government, whereby the American Export Lines is appointed the general agent to operate in the name of and for the benefit of the United States of America, War Ship-

ping Administration. The assignment of the particular ship, the Cape Britton, is relevant to the inquiry in this case because in the four overt acts of the conspiracy, it is alleged that on or about the 10th day of May, the defendants, or the defendant Goddard caused 45 cases of eggs to be sold to the United States of America, Matson Navigation Company, general agent, and to be delivered to the steamship Cape Britton at Pier 30 in the City and County of San Francisco. Now, the evidence will show that by the terms of this contract the American Export Lines, named as a general agent, had the power to select sub-agents, and the evidence will show that such a sub-agent was selected in the person of the Matson Navigation Company. This certified document is clearly admissible as a part of the proof in connection with this fourth overt act of the indictment. Of course, at the present time we have not yet proved the conspiracy. I will grant you that. Nevertheless, you can't prove everything in an indictment at once. The Court may have our assurance that we will prove the salient and necessary features of the indictment, and that after the conspiracy is established there can not be the slightest doubt but what this certified copy, this contract between the government, the War Shipping Administration, and this general agent is admissible. [28] in evidence.

Mr. Faulkner: We submit very respectfully that it is not admissible in evidence at this time for the reasons stated.

The Court: The Court will at this time limit it for the purpose of identification.

Mr. Pratt: I will not offer any of these contracts in evidence. I will offer them simply for identification. The next one, which will be Government's Exhibit 2 for Identification, is a certified copy of a contract between the United States and Moore McCormack Lines, Incorporated, together with an addendum letter designating or assigning certain ships.

The Court: The date?

Mr. Pratt: The contract is dated October 19, 1941.

The Court: It may be admitted and marked for the purpose of identification.

(The document in question was thereupon marked Government's Exhibit No. 2 for Identification.)

Mr. Pratt: I next offer for identification a certified copy of the contract between the United States War Shipping Administration and Agwilines, Incorporated, dated January 8, 1943, together with the addendum letter assigning certain vessels to the management by that company.

The Court: It may be admitted and marked for the purpose [29] of identification.

(The document in question was thereupon marked Government's Exhibit No. 3 for Identification.)

Mr. Pratt: I next offer for identification certified copy of a letter of agency allocation to Deconhil

Shipping Company dated March 11, 1944, and the service agreement between the War Shipping Administration and that corporation. This assigns certain vessels to the management of this corporation, including one named Mission San Diego.

The Court: It may be admitted and marked for the purpose of identification.

(The document in question was thereupon marked Government's Exhibit No. 4 for Identification.) [30]

Mr. Pratt: I now offer for identification certified copy of a contract dated October 12, 1943, between the United States of America, War Shipping Administration, and Alaska Packers Association with an addendum assigning certain vessel to the management of that company.

The Court: Admitted and marked for the purpose of identification.

(Contract dated October 12, 1943, marked Government's Exhibit 5 for Identification.)

Mr. Pratt: I will now offer for identification certified copy of contract between the United States of America, War Shipping Administration, and the Alaska Transportation Company, together with addenda letters, the contract being dated May 1, 1942, and the addenda letters January 8, 1943, June 8, 1943, and May 15, 1944, respectively, relating first to the contract and then again to the assignment of certain vessels to the management of that company.

The Court: Admitted and marked.

(Contract dated May 1, 1942, with addenda marked Government's Exhibit 6 for Identification.)

Mr. Pratt: I now offer for identification certified copy of a contract between the United States of America, War Shipping Administration, and the De La Rama Steamship Company, Incorporated, dated September 29, 1942, together with addendum letter dated May 15, 1944, being of the same [31] character as the others and assigning in particular the vessel Henry White for the management of that shipping company.

The Court: Admitted and marked.

(Contract dated September 29, 1942, marked Government's Exhibit No. 7 for Identification.)

Mr. Pratt: I next offer for identification certified copy of service contract and letter of allocation by the United States of America, War Shipping Administration, to the American Hawaiian Steamship Company, dated March 4, 1944; also another contract, War Shipping Administration with American Hawaiian Steamship Company dated March 1, 1942.

The Court: Admitted and marked.

(Copy of service contract and letter of allocation by the United States to American Hawaiian Steamship Company dated March 4, 1944, and contract War Shipping Administration with American Hawaiian Steamship Company dated March 1, 1942, marked Government's Exhibit No. 8 for Identification.)

Mr. Pratt: The next offer is of a certified copy of contract between the United States of America, War Shipping Administration, and Hammond Shipping Company, Limited, dated December 18, 1943, and service agreement with Hammond Shipping Company, Limited, dated June 3, 1942, likewise covering the assignment of certain vessel or vessels.

The Court: Admitted and marked. [32]

(Contract with Hammond Shipping Company, Limited, dated December 18, 1943, and service agreement with Hammond Shipping Company, Limited, dated June 3, 1942, marked Government's Exhibit No. 9 for Identification.)

Mr. Pratt: Next is a certified copy of a contract between the United States of America, War Shipping Administration, and the Olympic Steamship Company, Incorporated, with addenda letters, contract being dated April 15, 1942, and the letters of assignment October 12, 1943, and December 18, 1943; also it covers the assignment of certain vessels including the Steamship Heber H. Creel.

The Court: Admitted and marked.

(Contract with Olympic Steamship Company, Incorporated, dated April 15, 1942, and letters of assignment marked Government's Exhibit No. 10 for Identification.)

Mr. Pratt: I now offer for identification certified copy of a receipt for delivery of the motor vessel Day Star from the American President

Lines dated October 13, 1941, showing the receipt by the American President Lines of the motor vessel Day Star, assigned to the American President Lines for operation under the provisions which have already been outlined.

The Court: Admitted and marked.

(Certified copy of receipt for delivery of motor vessel Day Star from the American President Lines dated October 13, [33] 1941, marked Government's Exhibit No. 11 for Identification.)

Mr. Pratt: I next offer certified copy of allocation by the United States of America, War Shipping Administration, to Alaska Packers Company dated April 1, 1943, and service agreement with Alaska Packers Association dated October 7, 1942, and addendum number one to the same contract dated January 22, 1943, all relating to the same subject matter as the others and in particular referring to the assignment of a vessel or vessels to the management of Alaska Packers Association.

The Court: Admitted and marked for identification.

(Copy of allocation to Alaska Packers Association dated April 1, 1943, and service agreement with Alaska Packers Association dated October 7, 1942, marked Government's Exhibit No. 12 for Identification.)

Mr. Pratt: I offer for identification certified copy of a letter of allocation to Matson Navigation Company dated September 14, 1942, and service agreement with the Matson Navigation Company

dated March 6, 1942, and part two of the same contract dated November 20, 1942, all of a similar tenor relating not only to the contract but also to the assignment of certain vessels.

The Court: Admitted and marked.

(Letter of allocation to Matson Navigation Company dated September 14, 1942, and service agreement with Matson Navigation [34] Company dated March 6, 1942, and part two of the same contract dated November 20, 1942, marked Government's Exhibit No. 13 for Identification.)

Mr. Pratt: I will offer for identification certified copy of a service agreement between the United States of America, War Shipping Administration, dated July 3, 1942, with the Isbrandtsen Steamship Company, together with addendum letter dated April 2, 1943; besides the contract there is the assignment of certain vessels including one named the Josiah Royce.

The Court: Admitted and marked.

(Copy of service agreement dated July 3, 1942, with Isbrandtsen Steamship Company marked Government's Exhibit No. 14 for Identification.)

Mr. Pratt: The next is a certified copy of service agreement dated July 15, 1941, between United States of America, War Shipping Administration, and the South Atlantic Steamship Company, together with addendum letter dated October 12, 1943, these documents besides the contract of general

agency include the assignment of the steamship Cape Pillar.

The Court: Admitted and marked.

(Copy of service agreement dated July 15, 1941, with South Atlantic Steamship Company, marked Government's Exhibit No. 15 for Identification.)

Mr. Pratt: Next is a certified copy of a delivery covering [35] the steamship President Tyler dated June 22, 1942, signed by American President Lines and a service agreement contract between the United States of America, War Shipping Administration, with American President Lines, Limited, dated as of July 10, 1941, and part two to the same contract dated April 10, 1942, which shows the assignment of various vessels, including among others the President Tyler.

The Court: Admitted and marked.

(Copy of delivery covering steamship President Tyler dated June 22, 1942, signed by American President Lines and service agreement with American President Lines, dated July 10, 1941, and part two to same contract dated April 10, 1942, marked Government's Exhibit No. 16 for Identification.)

Mr. Pratt: Next is a certified copy of allocation by the United States of America, War Shipping Administration, to the American President Lines, dated April 18, 1943; copy of service agreement with American President Lines from the United States of America, War Shipping Administration.

dated as of July 10, 1941, and part two to the same contract dated December 10, 1942, again relating to the same subject. May I see the last one, Mr. Clerk? They may be the same; I am not sure.

The Court: Admitted and marked.

(Copy of allocation to American President Lines dated April 18, 1943; copy of service agreement with American [36] President Lines dated July 10, 1941, and part two to the same contract dated December 10, 1942, marked Government's Exhibit No. 17 for Identification.)

Mr. Pratt: Next I offer for identification certified copy of service agreement between the United States of America, War Shipping Administration, dated July 10, 1941, with the American President Lines, and part two to the same contract dated December 10, 1942.

The Court: Admitted and marked.

(Copy of service agreement dated July 10, 1941; with American President Lines, and part two to same contract dated December 10, 1942, marked Government's Exhibit No. 18 for Identification.)

Mr. Pratt: Next is certified copy of service agreement between the United States of America, War Shipping Administration, dated August 8, 1941, with the Mississippi Shipping Company, Incorporated, with addendum letter dated December 18, 1943, which relates again, among other things, to the assignment of certain vessels including the James King.

The Court: Admitted and marked.

(Copy of service agreement dated August 8, 1941, with Mississippi Shipping Company, Incorporated, marked Government's Exhibit No. 19 for Identification.)

Mr. Pratt: And the last, a certified copy of service agreement dated May 1, 1942, between the United States of [37] America, War Shipping Administration, and the Northland Transportation Company, together with addendum letter dated May 15, 1944; these documents, among other things, include the assignment of various ships to that company for management.

The Court: Admitted and marked.

(Copy of service agreement dated May 1, 1942, with Northland Transportation Company marked Government's Exhibit No. 20 for Identification.)

The Court: Ladies and gentlemen of the jury, keep in mind the admonition of the Court and return at ten o'clock tomorrow morning. You may be excused now. Adjourn until ten tomorrow morning.

(Adjournment was here taken until Wednesday, January 16, 1946, at ten o'clock a.m.) [38]

Wednesday, January 16, 1946, 10:00 o'clock a.m.

The Court: Call the roll of the jurors.

(The roll was called by the Clerk, all jurors present.)

The Court: Call your first witness.

Mr. Hippeli: Call Dr. Mericle.

DR. ROBERT B. MERICLE,

called as a witness by the government; sworn.

The Clerk: Will you state your name?

A. Robert B. Mericle.

Direct Examination

Mr. Hippeli: Q. What is your name, please?

A. Robert B. Mericle.

Q. You are Dr. Mericle?

A. That's right.

Q. What is your degree, please?

A. Doctor of vetgrinary medicine.

Q. When did you receive that? A. 1929.

Q. Where? A. Iowa State College.

Q. By whom are you presently employed?

A. By the United States Department of Agriculture.

Q. How long have you been with them?

A. About 17 years.

Q. Will you please explain to us briefly what your duties have been with them, with the Department of Agriculture?

A. When I went to the department I worked

(Testimony of Robert B. Mericle.)

with eviscerated poultry. For the past fifteen years I have been working [39] for the department on shell egg grading work and poultry grading work.

Q. What is your present capacity, please?

A. At the present time I am regional supervisor of the nine Western States on poultry and egg grading.

Q. What are your duties in that regard?

A. My duties in that regard consist of interpretations of grades and standards according to those set forth by the Secretary of Agriculture, to see that these are interpreted correctly, as far as our graders are concerned who do grading work for the department.

Q. What is your connection with the graders of the United States Department of Agriculture?

A. Supervise the graders in this area that we have licensed by the United States Department of Agriculture.

Q. Do you instruct them in the performance of their duties?

A. That is my full responsibility, to instruct them about their duties and responsibilities regarding their interpretations of grades and see that they are interpreted correctly at the time of grading.

Q. In that connection, do you conduct any schools?

A. Yes. From time to time we conduct egg grading schools where we will have all the graders together, and each grader will be required to grade

(Testimony of Robert B. Mericle.)

various lots of eggs. After grading those lots will be checked by me.

Q. Do you do any grading yourself?

A. Yes. [40]

Q. Where have you graded?

A. I have graded at the different firms in San Francisco and all the cities on the coast, where we have graders.

Q. Have you supervised the grading by those inspectors at certain firms in the bay area?

A. Yes, when I have been at the firm doing grading work with the graders.

Q. Would you give us your full title at the present time, please?

A. Regional supervisor working for the United States Department of Agriculture, the Dairy and Poultry Branch. I represent them as regional supervisor on poultry and egg grading work in the nine Western States.

Q. During what period of time was the War Food Administration associated with the Department of Agriculture?

Mr. Faulkner: We will object to that as calling for an opinion and conclusion of the witness on a matter that is to be determined by the statutes enacted in respect to the War Food Administration and the Department of Agriculture; it is not the best evidence.

The Court: Read the question.

(Question read by the reporter.)

The Court: If he knows he may answer.

(Testimony of Robert B. Mericle.)

Mr. Faulkner: Exception.

The Court: Objection overruled.

Mr. Hippeli: Q. Will you answer the question?

A. The War Food Administration was from December, 1941, to—— [41]

Mr. Hippeli: Approximately.

A. To approximately 1945, some period in 1945.

Q. During that time what was your inspection service known as?

A. Our inspection service was known as the inspection and grading division of the Dairy and Poultry Branch of the War Food Administration.

Q. Were you regional supervisor of that service?

A. I have been regional supervisor since 1943, the fall of 1943.

Q. Were the Department of Agriculture inspectors employed by the War Food Administration during that period? A. Yes.

Q. Did they perform the same service that they did when they were known merely as United States Department of Agriculture inspectors?

A. Yes.

Q. What did these inspectors inspect?

A. Grades of poultry, butter, cheese, eggs.

Q. Will you name a few of your inspectors, please, for us?

Mr. Faulkner: We will object to that as incompetent, irrelevant, and immaterial, and not binding upon the defendants, your Honor.

Mr. Hippeli: I asked the witness to name some of the Department of Agriculture inspectors.

(Testimony of Robert B. Maricle.)

The Court: Where? Here, or elsewhere?

Mr. Heppeli: Some of his inspectors who have been employed under him in and around the San Francisco Bay area. [42]

Mr. Faulkner: We will object to that. If they are witnesses in the case they will be brought here. It is not binding upon the defendants.

The Court: He may answer. Objection overruled.

Mr. Faulkner: Exception.

A. Some of the inspectors are Mr. Reed.

Mr. Hippeli: What is his first name?

A. Mr. Gordon Reed, Mr. David Moosman, Mr. Roadenberger, Mr. Shoemaker.

Q. Did a Mr. Jerry Blum work under you?

A. Yes.

Q. During what period, approximately?

A. Jerry Blum was with the San Francisco office at the time I arrived in September, 1943, and he stayed with us until he passed away later, in December of 1943.

Q. For whom did the United States Department of Agriculture inspect?

A. We do inspection work for the United States Navy, the United States Marine Corps, the Veterans Administration, the War Shipping Administration, the Coast Guard.

Q. Who calls for those inspections?

A. The various agencies requiring the inspection and the calls are made by the firms at the time deliveries are ready to be completed.

(Testimony of Robert B. Meriele.)

Q. What firm?

A. The firms who have contracts with the agencies just mentioned for delivery of the articles required.

Q. Those are the firms selling butter, eggs, and cheese? A. Yes. [43]

Q. Will you name several of these firms, please?

A. O'Brien, Sportano & Mitchell, California Poultry Producers, Pete Lerner.

Q. Was Nye & Nissen one of them?

A. Nye & Nissen.

Q. Generally, what are the two United States Department of Agriculture standards for retail grades of eggs?

Mr. Faulkner: We will object to that on the ground the standards are determined by regulations issued by the Department of Agriculture and those regulations are the best evidence, and cannot be modified or departed from by any witness or oral testimony. The standards are fixed by law.

Mr. Hippeli: The question, if your Honor please, was for the witness to state what the two United States Department of Agriculture standards for retail grades of eggs were. I asked him the names of the two retail grades.

Mr. Faulkner: That was not the question.

Mr. Hippeli: Will you read the question?

(Question read by the reporter.)

Mr. Faulkner: You did not ask for the names. If you qualify it by name I have no objection.

Mr. Hippeli: I will reframe the question.

(Testimony of Robert B. Mericle.)

Q. What are the two names of the United States Department of Agriculture standards for retail grades of eggs?

A. The two names are the Consumers Grades and the Procurement Grades. [44]

Mr. Faulkner: What was that?

The Court: Read the answer.

(Answer read by the reporter.)

Mr. Hippeli: May I have this document marked for identification, please?

The Court: Identify the document for the purpose of the record.

Mr. Hippeli: Government's Exhibit 21 for Identification is a document entitled, "United States Standards for quality for individual shell eggs. Order of promulgation of standards. United States Department of Agriculture. Effective January 2, 1943." Further entitled, specifically, "For official United States Standards for quality of individual shell eggs."

The Court: Admitted and marked for identification.

(The document was marked U. S. Exhibit 21 for Identification.)

Mr. Hippeli: May I hand the witness this document, your Honor?

The Court: Yes.

Mr. Hippeli: Q. Have you ever seen U. S. Exhibit 21 for Identification, Doctor? A. Yes.

Q. From whom did you receive that, or a copy of U. S. Exhibit 21 for Identification?

(Testimony of Robert R. Mericle.)

A. It is issued by the Secretary of Agriculture and sent to us through our Washington office. [45]

Q. What did you do with it?

Mr. Faulkner: We object to that as incompetent, irrelevant, immaterial, and hearsay as to the defendants. What he did is not binding on the defendants.

Mr. Hippeli: The question is—it is preliminarily laying the foundation for the admission into evidence of that particular document which contains the standards set forth on eggs of the consumers grades of shell eggs. I wish to show by the witness that those are the standards in accordance with which shell eggs are graded in the bay area. They are the standards which the inspectors use. They are the standards under which the defendants sold. They are the grades and standards which the defendants knowingly misrepresented to the Government.

Mr. Faulkner: I will assign—I don't want to assign it as misconduct. I objected to it. It didn't call for a speech like that. So the court will know the position of the defendants in respect to these regulations, we have no objection providing the regulation is material to the issues as they are developed from time to time to any standard or bulletin which has been registered in the Federal Register so it has the effect of a legal publication going in evidence in this case. In other words, the documents issued by the Department of Agriculture in most instances would not be binding

(Testimony of Robert B. Mericle.)

on a defendant. Those that are registered in the [46] Federal Register, we have no objection to any of them going in. That will be the only way, your Honor, that we will know in this trial which regulation obtained during the long period from 1938 to the present time, alleged in the indictment. We merely want it accurate. Counsel, we will object to any document that is not certified or indicated as having been filed in the Federal Register as the standard for the grading of eggs. That is what the law requires.

The Court: Is this the standard you have here? What is it? Tell the jury what it is.

The Witness: This document covers the standard of grades for individual shell eggs. It lists those grades into various classifications of AA, A, B and C. Under each classification it gives the requirements as to what is required for each individual grade, what constitutes these various grades, what it takes to constitute a grade AA, what it take to constitute a grade A, a grade B, and a grade C. It is what the graders use and it is what is used by all graders who grade and interpret shell eggs.

Mr. Faulkner: We will object to that. The witness could not qualify to testify what graders do unless he refers to this Department of Agriculture graders.

The Court: The court made the inquiry. Let the record stand. Objection overruled.

Mr. Faulkner: Exception.

(Testimony of Robert B. Mericle.)

Mr. Hippeli: Q. Had you completed your answer to his [47] Honor?

A. Yes.

Q. In other words, did you, yourself, Doctor, use the grades set forth in that particular bulletin in grading eggs in and around the San Francisco Bay area? A. Yes.

Mr. Faulkner: We will object to that question. He could not possibly use that document to grade eggs prior to the date of the issuance. That is the point of my objection. Here is an isolated document. I would assume it is an official grading—if it is official it would be in the Federal Register. Then we know which standard applies. But all the bulletins issued by the Department of Agriculture would not bind these defendants, very respectfully, your Honor.

Mr. Hippeli: I have asked the doctor a particular question. I think that question is the only thing before the court. I intend to offer the standards in evidence. I think, Mr. Faulkner, your objection would be pertinent. At the present time I am inquiring from the doctor as to whether or not the standards which are set forth in the document which he holds in his hand are the standards of eggs in accordance with which he personally graded eggs in and around the San Francisco Bay area. If he answers he did and if he wants to fix the time, I will do that.

Mr. Faulkner: We will object to it, because the document is dated a particular date. The question

(Testimony of Robert B. Mericle.)

is too general. He could not use the document prior to its issuance. [48]

The Court: Objection overruled.

Mr. Faulkner: Exception.

The Court: What was your answer?

The Witness: A. Yes, this was used.

Mr. Hippeli: Q. The inspectors of the U. S. Department of Agriculture used those grades under your supervision—used those standards under your supervision in grading eggs in and around San Francisco Bay area?

Mr. Faulkner: Same objection.

The Court: Overruled.

Mr. Faulkner: Exception.

The Witness: Yes, they did use them.

Mr. Hippeli: Q. Were the standards contained in U. S. Exhibit 21 for Identification the standards which were used by you in the school which you referred to a few moments ago?

Mr. Faulkner: Same objection; hearsay as to the defendants.

The Court: Overruled. He may answer.

Mr. Faulkner: Exception.

The Witness: A. Yes.

Mr. Hippeli: Q. How were those standards used by you in and around the San Francisco Bay area in the grading of eggs?

Mr. Faulkner: Same objection; incompetent, irrelevant, and immaterial, hearsay as to the defendants, not binding upon them, and the time unconnected with the issues in this case.

(Testimony of Robert B. Mericle.)

The Court: Overruled. [49]

Mr. Faulkner: Exception.

The Witness: A. These standards were used, were discussed with the graders in the school. We would take eggs we would call AA and classified as such according to the standards written in Exhibit A, which I am holding. They would be thoroughly gone into with respect to various quality factors which were used in determining the grade which we placed on a shell egg, the various quality factors consisting of the shell, the yolk, the white. In these there are various terms used descriptive of the outlines which represent the respective grades.

Mr. Hippeli: We will explain that a little more fully later, Doctor. May I further ask you, preliminarly, as to whether or not the U. S. Department of Agriculture inspectors graded eggs at the defendant Nye & Nissen's plant in accordance with the standards contained in U. S. Exhibit 21 for Identification?

Mr. Faulkner: Your Honor, I don't think I have made my position quite clear. We haven't any objection to the legal standards that obtained during a period that is specified. I submit very respectfully, your Honor, it is a matter of public record which standards obtained during the period covered here. It may be that, but we haven't seen it yet. We respectfully submit that we should not be in a position to object when we have no objection to the

(Testimony of Robert B. Mericle.)

standards. We merely [50] want to be sure it is the correct standards.

The Court: You mean this document?

Mr. Faulkner: Yes.

The Court: Ask the direct question. What is it?

Mr. Faulkner: The Federal Register will show. If it is documented in the Federal Register it is the official standard that binds these people. If that is what the document is there is no objection on my part.

The Court: Ask the direct question. What is the document?

Mr. Hippeli: Q. Is U. S. Exhibit 21 for Identification an official publication of the U. S. Standards for individual shell eggs? A. Yes.

Mr. Faulkner: The Federal Register will show it, your Honor.

The Court: The witness says it is. The question and answer will stand. Overruled.

Mr. Faulkner: Exception.

Mr. Hippeli: Q. Were the standards contained in U. S. Exhibit 21 for Identification the standards used by you in grading eggs at the defendant Nye & Nissen's plant? A. Yes.

Q. Were these standards used by the U. S. Department of Agriculture inspectors at the defendant Nye & Nissen's plant under your supervision?

Mr. Faulkner: We will object to that as not binding [51] upon the defendants, no foundation laid here that he was there supervising the men in

(Testimony of Robert B. Mericle.)

the plant of Nye & Nissen. What happened in his absence he could not possibly testify to.

The Court: Fix the time.

Mr. Hippeli: Q. Did you ever supervise the inspectors of the United States Department of Agriculture while they inspected at Nye & Nissen's plant in San Francisco? A. Yes.

Q. Were you in the plant with them?

A. Yes.

Q. During what period of time would you be down in the plant supervising this inspection?

A. At the time the inspections were made by our graders.

Q. When would it start? At what date would it start? That would be about when you came out here?

A. About the time I was assigned to the coast in 1943.

Q. From that time on have you supervised the inspections of your inspectors down at the defendant Nye & Nissen's plant? A. Yes.

Q. During that period of time were the United States standards for individual shell eggs contained in U. S. Exhibit 21 used by your inspectors at the Nye & Nissen plant?

Mr. Faulkner: We will object to that as calling for an opinion and conclusion of the witness. There isn't any way he could know what was done down there. They candle them in a dark room with a light in front.

Mr. Hippeli: Doctor Mericle has testified he

(Testimony of Robert B. Mericle.)

taught his [52] candlers how to candle and he candled himself, and he was down in the plant.

The Court: Read the question.

(Question read by the reporter.)

The Court: He may answer. Objection overruled.

Mr. Faulkner: Exception. [52-a]

The Court: You may answer.

Mr. Faulkner: The further objection that the best evidence is the testimony of the inspector that he graded according to those standards, not the best evidence.

The Court: You may answer.

The Witness: A: Yes sir.

Mr. Faulkner: Exception.

Mr. Hippeli: I hereby offer United States Exhibit No. 21 for Identification in evidence.

Mr. Faulkner: May I ask the witness some questions?

The Court: Certainly.

Mr. Faulkner: Q. Doctor, is it your testimony that this document No. 21 is the standard for the inspection of eggs during the period subsequent to its date up to the present time?

A. I did not understand you fully.

Q. Is it your testimony that this document, No. 21, is the official standard for the inspection and grading of eggs for the period of time commencing with its date up to the present time?

A. Not for the grading. It covers the indiv-

(Testimony of Robert B. Mericle.)

idual shell—not the grades of eggs, just the individual egg itself.

Q. Regardless of what it covers, is this the standard that applies to the subject matter of the document from the date the document bears up to the present time? A. Yes.

Q. Has it ever been modified? A. No.

Q. Has there ever been a bulletin issued modifying this in any way that you know of?

A. No.

Q. So that from the time, January 2, 1943, up to the present time, the United States Department of Agriculture has never issued any bulletin similar in type to Exhibit 21 affecting or modifying in any way the contents of that document; is that your testimony? A. That is right.

Q. Now, then, you testified, Doctor, that you have graded eggs or supervised the grading of eggs under this document over a period of time. When did you commence using this document in the San Francisco Bay area?

A. That document was in effect in the San Francisco Bay area when I arrived, in October of 1934.

Mr. Faulkner: That is all on the document. We object to any document purporting to be a standard or a bulletin or a regulation governing standards unless the proper foundation is laid by showing that it has been registered in the Federal Register, thus becoming applicable to the industry, and without that it is hearsay as to the defendants.

(Testimony of Robert B. Merricle.)

Mr. Hippeli: Would your Honor like to have argument on that at this time?

The Court: Yes.

Mr. Hippeli: Mr. Faulkner, from the statements which he has made to your Honor, avers that the only way that an official standards of the United States Department may be [54] approved is by publication in the Federal Register. That is one way, but I believe there are other ways. This document on its face recites matters of which the Court will take judicial notice. On its face the document states that the Secretary of Agriculture, the Department of Agriculture, has issued these standards pursuant to an act of Congress. The act of Congress has authorized the Secretary of Agriculture to issue standards in the following language: It states that, "For acquiring and diffusing among the people of the United States useful information relative to the standardization, classification, grading, preparation for market, handling and marketing of farm and food products, including the demonstration and promotion of the use of uniform standards of classification of American farm and food products throughout the world, the Department of Agriculture is authorized to issue standards."

The Department in exercise of this authority has promulgated the standards contained in United States Exhibit No. 21 for Identification. That authority was exercised in this particular case by the Under Secretary of Agriculture. These particular

(Testimony of Robert B. Mericle.)

standards were not published in the Federal Register. However, the Court is entitled to take judicial notice of the regulations of a department, and we submit that the witness has testified, and the Court will take judicial notice of the fact that these are the official regulations of the Department of Agriculture. These are the standards which have been issued [55] by the Department of Agriculture pursuant to congressional authorization.

Mr. Faulkner: If your Honor please, the position of the defendant is this: obviously in this industry during the entire period covered by this indictment there were standards to guide them. To illustrate, here is a purported standard dated January 2, 1943. There was undoubtedly a standard before that similar in scope. Now, on January 2, 1943, the Department of Agriculture issued this standard. Unless it was registered in the Federal Registry or promulgated in the industry and the defendants here were conscious of the issuance of this standard, they would be justified obviously under the law to continue to grade eggs under the old. Now, if it has been registered in the Federal Registry, that gives them legal notice as though it was a statute. If it has not been registered, then for it to be binding on the defendant it should be brought home to the defendant in some way because all during this period we have a great many of these standards that cover butter, eggs and cheese, and these were received in the regular course of business, and unless this was brought

(Testimony of Robert B. Merickel.)

home to the defendants it would be hearsay. How they graded would not make any difference. It would be how the defendants graded under applicable standards in their possession. Now, the promulgation of this has been to the classroom and to the graders. Now, have Nye & Nisson, Mr. Moncharsh, Mr. Goddard, or any of those [56] men had it? They have to bring this home to every one of the defendants in this case, having in mind the type of indictment they have laid before your Honor, unless it is an official document of which the Court may take judicial notice that the defendant is bound by.

The Court: Is the matter submitted?

Mr. Faulkner: Yes, your Honor.

Mr. Hippeli: Yes, your Honor.

The Court: The proper foundation has not been laid. The period begins here in 1943.

Mr. Hippeli: The witness has testified that these standards obtain from 1943 to the present time. That is the period when the standards were in effect. The witness has stated that the standards were used by his inspectors. The witness has stated that he used these standards in grading eggs known as the defendants' plant from the effective date of the standards, from January of 1943, to date.

The Court: How were those regulations brought home to these defendants?

Mr. Hippeli: I was intending to bring that out by another document, but I will submit this for

(Testimony of Robert B. Mericle.)

identification and go into the other document and show it was brought home to them then, your Honor.

The Court: Very well.

Mr. Hippeli: At this time I would like to have marked [57] for identification a card bearing the title "The United States Standards for Individual Shell Eggs."

(The document in question was marked U. S. Exhibit 22 for Identification.)

Mr. Hippeli: Q. Dr. Mericle, I will show you United States Exhibit No. 22 for Identification.

The Court: What is that?

The Witness: A. This shows the individual standards for individual shell eggs.

Mr. Hippeli: Q. From where were those standards obtained?

A. These were obtained from the Secretary's office.

Q. What I am trying to get at is this: Were they obtained from United States Exhibit 21 for Identification, the United States standards for quality for individual shell eggs? A. Yes sir.

Q. Who issued this chart, Exhibit No. 22 for Identification?

A. It is issued from the office of the Secretary.

Q. To whom?

A. To our office and through us to the graders.

Q. Have you distributed these to the defendant Nye & Nissen? A. Yes.

Q. Have you seen them in their plant?

(Testimony of Robert B. Merielle.)

A. Yes.

Q. When?

A. At the time I have graded eggs in their plant.

Q. At what time did you first grade eggs in their plant? A. The fall of 1943. [58]

Q. To what time? A. The present.

Q. Where did you first see this chart in their plant? A. In the egg candling room.

Q. Where would it be placed in the candling room? A. Placed up on the wall.

Q. Would it be placed any place else around the plant? A. It can be, yes.

Q. Did you see it placed anywhere else other than in the candling room A. No.

Q. Did you ever observe Mr. Moncharsh in the presence of this chart? A. Yes.

Q. Did you ever observe Mr. Goddard in the presence of the chart? A. Yes.

Q. Did you ever observe Mr. Berman in the presence of the chart? A. Yes.

Q. Did you ever observe Mr. Menges in the presence of the chart? A. Yes.

Q. Directing your attention to the letters under the first egg appearing on the chart, the letters "AA", what does "AA" mean?

A. That refers to the quality of the individual egg.

Q. What sets forth that quality?

A. It is the various quality factors.

Q. Pardon me, Doctor. I will make my ques-

(Testimony of Robert B. Mericle.)

tion more particular. Is the quality for the "AA" egg appearing on the chart, United States Exhibit No. 22 for Identification, is that quality set [59] forth in the standards contained in United States Exhibit No. 21 for Identification?

Mr. Faulkner: We object to that as calling for the opinion and conclusion of the witness. These documents speak for themselves. One has not been in evidence and one I assume he will some time offer in evidence. Interrogation of a witness, your Honor, on a document not in evidence, other than for identification, is improper under the rules. If you offer it in evidence I would like to be heard.

Mr. Hipplei: These questions are laying the foundation for the offer of both of these documents in evidence. The objection to the admission of the standards was that the knowledge of the standards was not brought home to the defendants. Dr. Mericle has testified that the standards for the individual shell eggs contained in our Exhibit 21 are set forth on a card which was officially issued by the United States Department of Agriculture, that the standards appearing on the card, that the card itself he saw posted in the defendants' plant and that he saw each of the defendants in the presence of the card. At this time we desire to offer both United States Exhibit No. 21 and United States Exhibit No. 22 for Identification into evidence.

The Court: Read the question, Mr. Reporter.

(Question read.)

(Testimony of Robert B. Mericle.)

The Court: The objection will be overruled. He may [60] answer.

Mr. Faulkner: Exception.

The Witness: A. Yes sir.

Mr. Hippeli: Q. Are the qualities appearing for the succeeding A, B and C eggs on the chart, United States Exhibit No. 22 for Identification, the grades set forth in the standards contained in United States Exhibit No. 21 for Identification?

A. Yes.

Mr. Hippeli: At this time the Government desires to offer United States Exhibit No. 21 and United States Exhibit No. 22 for Identification into evidence.

Mr. Faulkner: If your Honor please, may I ask the doctor a question?

Q. Doctor, you have indicated that you saw this card or a counterpart of this card, U. S. Exhibit No. 22 for Identification, in the plant of Nye & Nissen, is that correct? A. That is right.

Q. In the egg candling room?

A. That is right.

Q. When did you see it there?

Mr. Hippeli: That is objected to as asked and answered, your Honor.

The Court: He may answer. The objection is overruled.

The Witness: A. The fall of 1943.

Mr. Faulkner: Q. And how long after that did you see it there? For how long a period?

A. Until the present. [61]

(Testimony of Robert B. Mericle.)

Q. Is it still there? A. I do not know.

Q. You said until the present. When was the last time you saw it there? A. I do not know.

Q. Did you see it there in 1945? A. No.

Q. When was the last time that you were at the plant of Nye & Nissen? A. 1945.

Q. Did you see it there in the year 1944?

A. Yes.

Q. What part of the year? A. All year.

Q. August?

The Court: All year.

Mr. Faulkner: Q. All year? Now, do I understand that you saw in the candling room this card on the wall and saw Mr. Abe Moncharsh in that candling room? Is that your testimony?

A. In the presence of the chart, yes.

Q. In the candling room? A. Yes.

Q. And you also saw Mr. Henry Berman in the candling room with this chart on the wall?

A. Yes.

Q. And you also saw Mr. Menges in the candling room with this chart on the wall?

A. Yes sir.

Q. And you also saw Mr. Goddard in that room with the chart on the wall? A. Yes.

Q. Now, you have testified that this chart, No. 22, shows the same standards that are shown in Exhibit 21, is that correct? A. Yes.

Q. Now, then, Exhibit 22 does not purport to give all the [62] information that is contained in Exhibit 21, does it? A. No.

(Testimony of Robert B. Mericle.)

Q. In other words, this chart obviously is something prepared to strike the eye concerning standards which were in existence; isn't that correct? Isn't that what it purports to be? Something prepared by the Department of Agriculture to strike the eye to show the standards in existence? Isn't that what it is?

Mr. Hippeli: Tell him what the chart it.

Mr. Faulkner: No.

The Witness: The chart just covers——

Mr. Faulkner: Q. Just a moment. I would like the question answered as propounded. It is a simple question.

A. It shows your four individual grades.

Q. Isn't this a chart prepared by the Department of Agriculture to show the standards readily seen by the eye that were in existence at a particular time? A. Yes.

Q. It does not purport to be a resume of Exhibit 21, does it? A. Not completely, no.

Mr. Faulkner: We have no objection, your Honor, in the light of the testimony of the witness, to the chart going in, but we submit that nothing has been added to the foundation for Exhibit 21, and if your Honor looks at the chart and looks at Exhibit 21 your Honor will see the point of my objection. This Exhibit 21 is page after page, page after page, and I do not think there is any reference to Exhibit 21 in this document. [63] I am quite sure of it. We have no objection to this chart.

(Testimony of Robert B. Mericle.)

The Court: Let the chart be admitted in evidence.

(U. S. Exhibit 22 for Identification was thereupon received in evidence.)

Mr. Faulkner: Mr. Hippeli, I think this will be a benefit in the whole trial: When you offer this in evidence are you offering it on what counts of the indictment?

Mr. Hippeli: All of the counts.

Mr. Faulkner: We object to the introduction of the chart in evidence relating to eggs relating to a count in the indictment that relates to butter or a count in the indictment that relates to cheese.

Mr. Hippeli: There is no count in the indictment that does not include eggs.

Mr. Faulkner: Do you offer it as to all the defendants on all the counts?

Mr. Hippeli: Yes.

Mr. Faulkner: We object to it on the ground no foundation has been laid at this stage of the record for the introduction of this chart against all the defendants on all of the counts.

The Court: The objection will be overruled. Let it be admitted and marked.

Mr. Faulkner: Exception.

Mr. Hippeli: Q. Are all of the standards setting forth [64] the grades of eggs contained on United States Exhibit No. 22 taken from the United States standards for quality for individual shell eggs contained in United States Exhibit No. 21 for Identification?

(Testimony of Robert B. Mericle.)

Mr. Faulkner: We object to that as calling for the opinion and conclusion of the witness, your Honor. They have had standards for eggs for fifty years. This witness is not qualified to answer how they prepared this.

Mr. Hippeli: I did not ask him how they prepared it. I asked the witness whether the standards as set forth on the card are contained in the standards contained in Exhibit 21 for Identification. The witness, I submit, is qualified, because he has been employed by the United States Department of Agriculture supervising the inspection and grading of eggs. He is the regional supervisor. He is the person who teaches the inspectors, the graders, what the grades are and how they are to inspect. We submit the objection.

Mr. Faulkner: We respectfully submit that when two documents are before the Court, the documents speak for themselves as to whether they are identical, whether they are similar, or whether they have marked differences.

The Court: The objection will be overruled. If he knows he may answer.

Mr. Faulkner: Exception.

The Witness: A. Yes sir. [65]

Mr. Hippeli: Q. Directing your attention to the fine print contained down in the lefthand corner of United States Exhibit No. 22 and the words "U. S. Light Dirty and U. S. Dirty," what defines a standard of a U. S. Light Dirty and a U. S. Dirty?